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Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,
Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 20, 1954

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The decision of the Court of Appeals dismissing the appeal below was endorsed by the Court (Judges Chase, Frank and Hincks) on the back of the motion papers before them (R. 21), and was without opinion.

Jurisdiction

The formal judgment of dismissal (R. 3, page 6a of the petition) was entered the same day as the decision, June 10, 1954.

Jurisdiction is invoked by the petitioner under 28 U. S. C. § 1254 (1).

Questions Presented

1. Is it not a defect going to the jurisdiction of the Court of Appeals where a party seeking to appeal from a judgment in a civil action fails to pay the prescribed filing fee (28 U. S. C. § 1917) to the District Court Clerk within the required 30-day period for filing a notice of appeal (28 U. S. C. § 2107), and the Clerk, having given prompt notice that the notice of appeal he had received would not be filed until the fee had been received, does not receive the fee or file the notice of appeal until after the expiration of the statutory 30-day period?

2. If the defect is jurisdictional, can it be cured by a subsequent order of the District Court directing the Clerk to accord the notice of appeal a filing date *nunc pro tunc* as of the day it was received by him without the fee, and expressly withheld from filing?

Statutes Involved

The provisions of 28 U. S. C. § 1917 (requiring the payment of a fee of $5.00 upon the filing of a notice of appeal) are set forth in the petition at page 2.

The provisions of 28 U. S. C. § 2107 (limiting the time for filing a notice of appeal to 30 days from the entry of the judgment) are set forth in an appendix to this brief, at page 1a.

Statement

On April 22, 1954, the Clerk of the United States District Court for the Northern District of New York, at Utica, entered a judgment, signed by the trial judge, James T. Foley, D. J., in favor of declaratory plaintiffs in *Telechron, Inc. and General Electric Company* v. *Anthony J.*

Parissi, Civil Action No. 3831 (R. 3, appendix p. 2a)*. Judge Foley's opinion on the merits is reported at 120 F. Supp. 235.

On May 21, 1954, a Friday, (one day before expiration of the statutory 30-day period), the Clerk received a notice of appeal (R. 6, page 1a of the petition) from the judgment of April 22, 1954, and an appeal bond, from Parissi's attorneys, Andros & Smith, of Albany, New York. The same day he wrote a routine letter to Andros & Smith that he was obliged to withhold any filing of the notice of appeal or bond pending his receipt of the statutory filing fee (R. 12).

On May 24, 1954, a Monday, Harry A. Smith, Esq., of Andros & Smith, forwarded the fee (R. 13). The fee was received by the Clerk on May 25, 1954 (three days after the expiration of the statutory period), and the notice of appeal and bond were then filed. The fact of this May 25th filing was entered in the District Court docket (R. 1) and was endorsed by the Clerk on the back of the notice of appeal (R. 8a).

Seeking to cure the defect of this filing out of time, petitioner's counsel, Mr. Smith, on affidavit (R. 10, page 2a of the petition) and without any prior notice to respondents,** obtained from Judge Foley an order, dated May 27, 1954,

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*Despite the statement at page 2n of the petition that "The record before the Court of Appeals is set forth herein as an Appendix to this Petition", the District Court judgment does not appear in that appendix, although it is a part of that record. Other items which are included in the certified record, but not reproduced in the appendix to the petition, will also be referred to in this brief.

**At page 7 of the petition it is stated that "Under Rule 6(b)(2), F. R. C. P., there would seem to be room to act as Petitioner did" in seeking a *nunc pro tunc* order from Judge Foley. But Rule 6(b) specifically excepts Rule 73(a), relating to the time for appeals. See *infra*, pp. 4n-5n, 10n. Also, Rule 6(b)(2) requires that any application for the enlargement of a time which has already expired shall be made only on motion and after notice to the other parties. A similar *ex parte* procedure was held improper in *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952).

directing that Parissi's notice of appeal be accorded a filing date *nunc pro tunc* as of May 21, 1954, the day it had been received, without the filing fee, and expressly withheld from filing, by the Clerk (R. 9, page 4a of the petition).

On May 28, 1954, pursuant to this order, the Clerk made a notation in the District Court docket (R. 1), and in the endorsement on the back of the notice of appeal (R. 8a), changing the recorded filing date of the notice of appeal from May 25, 1954, the actual date of filing, to May 21, 1954, which would have been a timely date.

On June 3, 1954, the Clerk, in compliance with respondent's request under F. R. C. P. 75 (j) (R. 14), certified and transmitted a partial record to the Court of Appeals. On the same day, respondents moved to dismiss the appeal for lack of jurisdiction, the notice of appeal not having been filed within the 30 days allowed by law (R. 18, page 5a of the petition).

The motion to dismiss was argued at the next regular motion day of the Court of Appeals, held June 7, 1954, and on June 10, 1954 the Court dismissed the appeal.

Argument

I. THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The intent and meaning of 28 U. S. C. § 2107 is clear and unambiguous. Apart from exceptions here not pertinent*, the statute prescribes that "no appeal shall bring

*The action in the District Court was not one in admiralty, nor one involving bankruptcy matters or other proceedings under Title 11. The United States, or an officer or an agent thereof, was not a party. Parissi did not attempt to invoke the exception which permits a District Court to extend the time for filing a notice of appeal up to an additional 30 days "upon a showing of excusable neglect based

any judgment . . . in an action . . . of a civil nature before a Court of Appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment . . .". F. R. C. P. 73(a) is to the same effect.

Consistent with the holding of this Court in *George* v. *Victor Co.*, 293 U. S. 377 (1934) that a Court of Appeals is without jurisdiction where an appeal is not taken within the time prescribed by law, it has been uniformly held that failure to cause a notice of appeal to be filed within the required period, as required by statute, is not a mere procedural irregularity but is a jurisdictional defect depriving the Court of Appeals of any power to review the judgment.

Principale v. *Associated Gas & Elec. Co.*, 192 F. 2d 1016 (2 Cir. 1951), cert. denied 343 U. S. 942 (1952)

Deena Products Co. v. *United Brick & Clay Workers*, 195 F. 2d 612 (6 Cir. 1952), cert. denied 344 U. S. 822 (1952)

Howard v. *Local 74*, 208 F. 2d 930 (7 Cir. 1953)

St. Luke's Hospital v. *Melin*, 172 F. 2d 532 (8 Cir. 1949)

Mondakota Gas Co. v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952)

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on failure of a party to learn of the entry of the judgment . . ."; nor could he have successfully done so in view of the obvious prior knowledge of the entry of judgment reflected in his notice of appeal of May 20, 1954—knowledge based upon receipt of a certified copy of the judgment, and ~~of the Clerk's~~ notice of entry, promptly served upon him by respondents' attorneys (R. 28, appendix to this brief, p. 2a). That the time for filing a notice of appeal cannot be extended for any other reason, see e.g. *Howard* v. *Local 74*, 208 F. 2d 930 (7 Cir. 1953), *Watson* v. *Providence-Washington Ins. Co.*, 201 F. 2d 736 (4 Cir. 1953).

Spengler v. *Hughes Tool Co.*, 169 F. 2d 166 (10 Cir. 1948)

Randolph v. *Randolph*, 198 F. 2d 956 (App. D. C. 1952)

Since the Clerk of the District Court did not file Parissi's notice of appeal, or treat it as filed, until May 25, 1954, three days after the statutory period for filing the notice had expired, the Court of Appeals correctly dismissed the appeal.*

Clearly the mere receipt and retention of the notice of appeal by the Clerk before the expiration of the statutory period did not constitute a filing within the meaning of the statute. *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952). For, as stated in *United States* v. *Lombardo*, 241 U. S. 73, 76 (1916), "A paper is filed when it is delivered to the proper official and by him received and filed (citing Bouvier's Law Dictionary and other authority)".

Parissi's skeletonized quotation from Bouvier (page 6 of the petition) is incomplete. Omitted are Bouvier's statements that filing requires "making of the proper indorsement by the officer receiving the paper", and "The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become part of the public record. It is not synonomous with deposited". Here Parissi's notice of appeal was not endorsed as filed by

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*An appellate court has no discretion, on general equitable grounds, to dispense with the statutory requirements for a timely appeal. *Yturbide's Executors* v. *United States*, 22 How. (63 U. S.), 290 (1859); cf. *Ray* v. *Morris*, 170 F. 2d 408 (7 Cir. 1948).

the Clerk, until May 25, 1954, after the statutory time for appeal had expired. And certainly the Clerk's mere retention of a document as a voluntary custodian, awaiting receipt of the filing fee, is not the equivalent of making an entry of filing in the Court docket and placing the document among the records of the Court available for public scrutiny.*

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*Cf. *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921, 923 (E. D. Ill. 1943), where it is stated:

> ". . . the document in question was not filed before September 20. It had not become a part of the files of the clerk's office. The actions of that official speak with significance. He received in the mail a transcript "to be filed". He did not file it but wrote that he had received it for the designated purpose and that the fee was $5 and must be remitted. When remittance arrived, for the first time, he marked the document filed. All this reflected only an intention upon his part to hold the document in abeyance as tendered for filing until the fee was received. Nothing in the language he used, or in his acts, indicate an intention to waive the prescribed statutory condition precedent, that is, payment of the filing fee. On the contrary, from the time the paper arrived in the mail until the fee was paid, he held the document as a voluntary custodian, withheld it from the official records, waived no collection of the fee and conferred upon the document nothing of official character until the condition precedent had been satisfied.
>
> "From another viewpoint, by submitting the papers to the Clerk of Wayne County, plaintiff's attorney made an offer or tender. The clerk did not accept this, but submitted a counter-offer,—that he would file the transcript when the fees were paid. Until plaintiff's attorney accepted this counter-proposal, by submitting the filing fee, the transcript was not filed. It may well be that if one makes a physical tender of the instrument, the clerk is in a position immediately to accept or reject it—with or without the prescribed filing fee. But where the document is delivered by mail, the clerk does not voluntarily receive it officially without advancement of the fees. He is under no obligation to file it until the fee has been paid. Though his conduct subsequent to the receipt of the paper, under certain circumstances, may be such that he is deemed constructively to have waived advancement of the fee, the clerk did not do this here; rather, he promptly informed plaintiff's attorney of the receipt of the instrument, and requested that the fee be forwarded."

That petitioner cannot properly criticize the Clerk for not taking special steps to relieve him of the consequences of his own neglect, is also evident. On noticing the absence of the filing fee, the Clerk acted in the only way a party, or a party's counsel, had any right to expect him to act: He sent a letter by return mail pointing out the defect and advising counsel of his refusal to file the notice until he received the statutory fee. And clearly the Clerk was under no obligation to file the notice of appeal until the filing fee prescribed by 28 U. S. C. § 1917 was paid.

> *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid.* cert. denied 344 U. S. 827 (1952).
>
> "A motion to dismiss the appeal is before us.
>
> "Formal judgment was signed and entered in the docket of the District Court on November 8, 1951.
>
> "On December 3, 1951 a notice of appeal from the formal judgment of November 8, 1951 was received by the Clerk of the District Court but was not accompanied by the filing fee of $5.00; hence, the notice of appeal was not accepted for filing and was not then filed. The required filing fee was received by the Clerk on December 12, 1951 and the notice of appeal was on said date duly filed.
>
> * * *
>
> "Filing of notice of appeal within the required time is jurisdictional. The Clerk of the District Court was under no obligation to file the notice of appeal until the fee was paid. Appellant contends that the receipt and retention of the notice of appeal before the expiration of the thirty-day period constituted a filing. We are unable to agree.
>
> * * *

"In the instant case the failure to cause to be filed in time the notice of appeal was not a mere procedural irregularity; it was a jurisdictional defect.

* * *

"Appeal dismissed". (Footnotes omitted)

See also:

Smith v. *Johnston*, 109 F. 2d 152, 154 (9 Cir. 1940).

In accord:

Steever v. *Rickman*, 109 U. S. 74 (1883);
Turkett v. *United States*, 76 F. Supp. 769 (N.D. N. Y. 1948);
Anno v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953);
Oil Well Supply Co. v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943)*;
Ommen v. *Talcott*, 180 Fed. 925, 926-7 (S. D. N. Y. 1910).

The reason behind the rule of these cases is well stated in the *Turkett* opinion, indicating the long followed and judicially sanctioned practice of the Clerk of the District Court for the Northern District of New York of requiring pay-

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*The opinion in the *Oil Well Supply* case includes the following excerpt from 53 Corpus Juris 617-8 omitted from the abbreviated quotation from that work appearing in the petition (page 9): "'. . . valid filing . . . of an instrument is effected by delivering the instrument to the proper officer and paying him the fees allowed by law; and it has been held that unless there is prepayment of such fees, effective recording cannot be predicated upon the delivery of an instrument to the proper officer for record . . . Further, where there is no prepayment of the required fee, the recording officer may refuse the paper to record.'"

ment of statutory filing fees on presentation of papers for filing. In construing a similar statute (28 U. S. C. § 549, 1925 Ed.)* relating to the fee to be paid on institution of an action in a District Court, Judge Brennan of that Court, after pointing out that it is the filing of a complaint which institutes the action, stated (p 770), ". . . a prerequisite of the filing is the payment of the clerk's fees. Any other construction would open the door to actions without merit by irresponsible parties, and make the clerk a credit man, whose accountability might result in his personal loss."

As for the *nunc pro tunc* order of May 28, 1954, this order and the changes in docket entry and endorsement made by the Clerk pursuant to it are clearly without legal significance and cannot cure the fatal jurisdictional defect of late filing.** For as stated in *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258, 261 (1888):

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*"*Fees of clerks of district courts; on institution of suit or proceeding.* Upon the institution of any suit or proceeding, whether by original process, removal indictment, information or otherwise, there shall be paid by the party or parties so instituting such suit or proceeding, as fees of the clerk for all services to be performed by him in such case or proceeding, except as hereinafter provided, the sum of $5. (Feb. 11, 1925, c. 204, § 2, 43 Stat. 857)."

**Petitioner errs when, in speaking of F.R.C.P. 60(b), he states (page 8) that "there would seem, also, to be room for Petitioner to act under this Rule" to relieve the defect. Firstly, the Court of Appeals did not suggest, as petitioner says it did (pages 3, 8) that he move under Rule 60(b). Judge Frank merely inquired if Parissi's counsel had any thoughts as to whether Rule 60(b) might provide a way for that court to avoid the necessity of dismissing the appeal. Secondly, the law is clear that the Federal Rules of Civil Procedure cannot be used to enlarge or diminish the jurisdiction of the Federal Courts. *United States* v. *Sherwood*, 312 U. S. 584, 590 (1941), *Sibbach* v. *Wilson*, 312 U. S. 1, 10 (1941). In *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254, 255 (9 Cir. 1952) it was specifically stated that ". . . Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal . . ."

> "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In accord: *Old Nick William Co.* v. *U. S.*, 215 U. S. 541 (1910)

And *cf.*: *United States* v. *Hall*, 83 F. 2d 94 (1 Cir. 1936)

Contrary to the assertion at page 10 of the petition, the appellant in the *Mondakota* case, *supra*, *had* sought a *nunc pro tunc* order directing the Clerk to file the notice of appeal as of the date it had been received without the filing fee. But in that case the District Court correctly refused to grant any such order (Briefs and record on petition for certiorari, No. 152, October Term 1952).

Parissi's appeal was properly dismissed for lack of jurisdiction.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

Petitioner indiscriminately charges that the decision of the Court of Appeals is in conflict with two decisions of this Court, seven decisions of other Courts of Appeal, and three other decisions of the Court of Appeals for the Second Circuit.*

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*All but two of these decisions are specifically stated to be in conflict and are discussed in the petition at pages 4-7. The other two decisions, treated as if in conflict, relate to the propriety of the *nunc pro tunc* order and are discussed in the petition at pages 10-11.

These allegedly conflicting decisions are clearly distinguishable. Their rulings applied to the facts and statutes involved in this case would not have resulted in a different decision below.

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327 (1900), cited at page 5 of the petition, dealt with the question of timely filing of a writ of error. The Court of Appeals for the Ninth Circuit had dismissed the appeal because the endorsement by the deputy clerk of the lower court merely stated that he had received a *copy* of the writ of error on a date within the prescribed time for taking the appeal, but did not state that the *original* writ of error had been received. This Court reversed, holding that it was the actual fact of filing which controlled and not the mere presence or absence of the endorsement on the original writ of error. An affidavit of the deputy clerk disclosed that the original writ of error had been presented and received with the copy, and had been treated by him as filed, although not endorsed by him because it was not his custom to endorse the original. Since the party seeking review had done in time all that was required of him, and the clerk's office had treated the original writ of error as in fact filed, the technical omission by the deputy clerk to endorse the original writ of error was held not to be a jurisdictional defect. In the present case, on the other hand, there was no timely compliance by Parissi with all that the statutes prescribed and the clerk did not treat the notice of appeal as filed until he received the statutory filing fee, after the time for appeal had passed.

In *Hill* v. *Hawes*, 320 U. S. 520 (1944), cited at page 10 of the petition, this Court, reversing the Court of Appeals for the District of Columbia, approved the action

of a District Judge in vacating an already-entered judgment and entering a new judgment in the same terms, in order to permit a new running of the time for appeal, on the grounds that the appellant had failed to make a timely filing of his notice of appeal because he relied on the requirements of F. R. C. P. 77(d) that the clerk should serve a notice of entry of the original judgment by mail on the losing party (and make a note of the mailing in his docket), and that the clerk had failed to do so. It is true that in the instant case it does not affirmatively appear that such a notice of entry was sent to Parissi *by the Clerk,* and there is no note to this effect in the District Court docket (R. 1). But ~~the clerk's~~ notice of entry *was* promptly served on Parissi by respondents' counsel (R. 28, Appendix, p. 2a), and Parissi clearly cannot meet the *Hill* v. *Hawes* requirement that the late filing was due to ignorance of the fact that judgment had been entered, in view of the fact that his notice of appeal (affirmatively indicating timely knowledge that the judgment had been entered) was originally mailed to the clerk in time. In any event, a conclusive answer to the citation of *Hill* v. *Hawes* is found in the 1946 amendments to F. R. C. P. 77(d)* and 73(a)** which, as the notes of the Advisory Committee on Rules clearly state, were intended to give an exclusive remedy (embodied in 28 U. S. C. § 2107) for such situations. Cf. *Huff* v. *United States*, 192 F. 2d. 911, 913 (5 Cir. 1951),

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*"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)."

**". . . the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . . except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed . . ."

cert. denied 342 U. S. 946 (1952). As noted *supra*, p. 4n, this remedy was neither sought by, nor available to, Parissi.

Four Court of Appeals cases cited at pages 4-5 of the petition, *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949), *Wallace* v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948), *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941), and *Williams* v. *United States*, 188 F. 2d 41 (App. D. C. 1951), involve criminal appeals, in which the time for appeal was set by the Federal Rules of Criminal Procedure and not by 28 U. S. C. § 2107. In each of these cases the appellant, unlike petitioner here, was incarcerated and acting *pro se**. And in each of these cases the appellant, unlike petitioner here, did everything within his power to effect a timely filing of the appeal. In the *Oddo* case the appellant had sent the filing fee to his prison warden promptly after knowledge of the entry of judgment and in time for it to have been transmitted to the clerk for timely receipt. The Court of Appeals held that appellant should not be charged with the delay caused by prison routine in the transmission of the fee. The facts and holding of the *Wallace* case are substantially the same as those in the *Oddo* case. In the *Boykin* case appellant, who had handed his notice of appeal to the district judge within the time for appeal, was excused for failure to pay the filing fee in time because the judge had failed to then inform him of the filing fee requirement. And in the *Williams* case the notice of appeal was delivered by appellant to a United States marshal who could have transmitted it to the clerk in time for the clerk to notify appellant of

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*The doctrine of the cited cases has been distinguished, even in a criminal appeal, where the appellant was, as here, not acting *pro se* but was represented by counsel in the district. *Crow* v. *United States*, 203 F. 2d 670 (9 Cir. 1953).

the filing fee requirement, and receive the fee from him, within the time permitted for appeal. The Court held the appellant should not be charged with the marshal's delay.

In *Crump* v. *Hill*, 104 F. 2d 36 (5 Cir. 1939), cited at page 6 of the petition, although no formal notice of appeal had been filed in time, appellant had filed with the clerk appellee's waiver of a notice of appeal, appellee's entry of appearance to the appeal, and appellant's designation of the record on appeal, all within the time for appeal, and within that time appellee had also filed with the clerk its own designation of the record on appeal. The Court held that this was the "complete equivalent" of the filing of a notice of appeal. In the case presented by this petition, *nothing* had been *filed* with the clerk within the requisite 30-day period.*

Casalduc v. *Diaz*, 117 F. 2d 915 (1 Cir. 1941), cert. denied 314 U. S. 639 (1941), cited at page 6 of the petition,** relates to an appeal in a bankruptcy case. The appeal was dismissed for lack of jurisdiction. The Court accepted as true the statement of appellant's counsel that after the

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*Subsequent to its decision in *Crump* v. *Hill*, the Court of Appeals for the Fifth Circuit, in *Morrow* v. *Wood*, 126 F. 2d 1021 (1942), had before it a situation where appellant had filed a transcript, praecipe, supersedeas bond, and designation of record, all within the allowable period for appeal. Appellees had notice of these proceedings. However, the notice of appeal had been filed after the period had expired and no extension of time had been obtained. The Court dismissed the appeal, holding (1) the defect was jurisdictional and (2) even if the proceedings taken were to be considered to have constituted such substantial compliance with the law as to give jurisdiction, the appeal should be dismissed for failure to file and docket the record within the time prescribed by F.R.C.P. 73(g). Other cases distinguishing *Crump* v. *Hill* are *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705, 706 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952), and *Howard* v. *Local 74*, 208 F. 2d 930, 934 (7 Cir. 1953).

**And again cited at page 7 of the petition, where the headnote to this case appearing at 4 Fed. Rules Serv. 818 is quoted.

closing hour of the clerk's office on the last day for filing, he had slipped the notice of appeal under the clerk's door. But the Court held that this act had not satisfied even the first requirement for a filing: That the document be delivered into the actual custody of the clerk. This requirement failing, the Court did not go into the question of whether any other requirements, such as the payment of any filing fee, had been met.

In *Reynolds* v. *Imlay,* 118 F. 2d 53 (App. D. C. 1941), cited at page 7 of the petition, there were conflicting statements in affidavits before the court regarding occurences below relating to the time of tender to the clerk of a notice of appeal in an *in forma pauperis* action. The Court did not pass on the question of timely filing, but merely submitted the conflict of fact to the District Court under F. R. C. P. 75 (h), with the request that it settle the controversy and conform the record to the truth.

The Court in *United States* v. *Todar,* 41 F. 2d 146 (7 Cir. 1930), cited at page 10 of the petition, was dealing with 28 U. S. C. § 230, 1925 Ed. which required that an appeal be "applied for" in the court which gave the judgment, within three months after its rendition. Judgments had been entered on August 22, 1928. On November 19, 1928, there were filed in the clerk's office notices of appeal with proof of service, a motion for an extension of the time for filing bills of exceptions and assignments of errors, and an order of the court granting the motions. On December 11, 1928 another order was filed granting another 30-day extension, and on December 26, 1928 the bills of exceptions and assignments of error were filed. On January 14, 1929, an order was filed, "*nunc pro tunc* as of November 19, 1928", enlarging the time for docketing the appeals, and on March 30,

1929 an order was filed allowing appellant in each case an appeal, "*nunc pro tunc* as of November 19, 1928." The Court of Appeals held that the order of November 19, 1928 was a nullity because it was entered after commencement of a new term of court, and that since the bills of exceptions were thus not part of the record before it, the judgments below must be affirmed. Before so holding, it assumed that the order of March 30, 1921 "sufficiently manifests application for an allowance of the appeals by the District Court as of November 19, 1928" (p. 147). The Court of Appeals did not hold that the "*nunc pro tunc* order" validated an otherwise untimely appeal. Since it was the actual fact of allowance, rather than any formal order of allowance which controlled (*Brandies* v. *Cochran*, 105 U. S. 262, 1881), the Court of Appeals clearly felt, and in effect stated, that the District Judge had in fact allowed the appeal on November 19, 1928.* His orders of November 19, December 11 and January 14, indicating a belief on his part that the appeal was in progress, corroborate this. The order of March 30, 1929 merely set the record straight; it was not a retroactive allowance of the appeal.

The Court in *United Drug Co.* v. *Helvering*, 108 F. 2d 637 (2 Cir. 1940), cited at page 5 of the petition, was dealing with an appeal under § 906(g) of The Revenue Act of 1936 from an order of the United States Processing Tax Board of Review. The appeal was dismissed for lack of jurisdiction. The statute required that a petition for review be filed "in the Circuit Court of Appeals" within three months after the decision of the Board. Nothing was

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*If the Court of Appeals had been in doubt as to this fact it could have sent the case back to the District Court for a determination on the point, as the Court did in *Donaldson* v. *Baltimore Acceptance Corp.*, 38 F. 2d 215 (3 Cir. 1930).

presented to the clerk of the Court of Appeals until after that, although a petition had been filed with the clerk of the Board in time. The Court addressed itself to the question whether this filing was a compliance with the statute and held that it was not. It did not make any ruling as to what constituted a "filing", although it did speak of the need for some paper to be "lodged" in the proper court.

In the *United Drug Co.* case, the Court of Appeals referred to its earlier opinion in *Jarowski* v. *Hamburg American Packet Co.*, 186 Fed. 332 (2 Cir. 1911), cited by Parissi at page 5 of the petition. After questioning the correctness of its holding in the earlier case, it distinguished it on the ground that in the case before it appellee had done nothing to mislead the appellant into permitting the time within which an appeal should be taken to expire, as he had in the *Jarowski* case. The distinction is equally applicable to the present case.

Petitioner's quotation at page 6 of the petition from *Federal Deposit Ins. Corp.* v. *Congregation Poiley Tzedeck*, 159 F. 2d 163, 166 (2 Cir. 1946) itself reveals that the Court there took a position in accord with, and not opposed to, the decision in this case. For as shown *supra*, the minimum requirement for taking an appeal stated in that case, "that some paper . . . be accessible in *the records of a court* upon which both judges and parties can rely", was not complied with here until after the expiration of the statutory time.

From the foregoing, it is readily apparent that the aserted conflict between the decision below and the cases cited by petitioner "arises from differences in states of fact, not in the application of a principle of law". *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813 (1931). It is

also apparent that the decision below was and is wholly in conformity with those prior rulings which related to the same, or similar, fact situations.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT RAISE ANY ISSUE OF PUBLIC IMPORTANCE

The question before the Court of Appeals was not novel or unsettled. The Court's decision was correct and in harmony with prior holdings relating to time for appeals.

The right of appeal is not a natural right, preserved by the Constitution, nor is it essential to due process of law. An appeal is granted to a losing party on condition that he comply with the statutes permitting the appeal. The statutes involved in the instant case are clear and unambiguous, and have been uniformly interpreted. Their stated requirements are not troublesome to the ordinary practitioner or litigant. There is no judicially sanctioned excuse for petitioner's failure to observe them here.

A District Court clerk does not, as contended at page 9 of the petition, "have arbitrary power, even to the extent of defeating appellate jurisdiction". No clerk could validly preclude an effective filing of a notice of appeal timely received by him with the filing fee. But a prospective appellant, and his counsel, do have such power. If jurisdiction of the Court of Appeals in this case can be said to have been "defeated", it was defeated by petitioner's prolonged indecision to take the appeal and his failure to observe the statutory requirements in his last minute attempt to do so. The defeat is of importance only to the parties to this case.

The petition does not present substantial grounds requiring review.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES H. WALKER
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Of Counsel:

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20 Exchange Place
New York 5, New York

September 20, 1954

APPENDIX

28 U. S. C. § 2107, 1948 Ed.

28 U. S. C. § 2107. Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. (As amended May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104)

Notice of Entry of Judgment and Affidavit of Service

UNITED STATES OF AMERICA
DISTRICT COURT CLERK'S OFFICE
NORTHERN DISTRICT OF NEW YORK

I, G. A. PORTER, Clerk of the District Court of the United States for the Northern District of New York, DO HEREBY CERTIFY that I have compared the annexed copy of Judgment—Telechron, Inc. and General Electric Company against Anthony J. Parissi Civil 3831 with the original now on file in this office; that the same is a correct transcript therefrom and of the whole of said original.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Utica, in said District, this 22nd day of April, A. D. 1954

G. A. PORTER, *Clerk.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

TELECHRON, INC. and GENERAL ELECTRIC COMPANY, Plaintiffs, v. ANTHONY J. PARISSI, Defendant.	Civil Action No. 3831

JUDGMENT

This action having been tried before the Court, and the evidence and briefs having been considered, and the

Court on April 12, 1954 having rendered its opinion and made findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That defendant is the owner of patents 2,444,748 and 2,512,775, and reissue patent 23,261.

2. That each of claims 7, 11, 16, 19 and 20 of patent 2,444,748 is invalid and void.

3. That each of claims 7, 11, 16 and 19-27 of reissue patent 23,261 is invalid and void.

4. That each of claims 10 and 11 of patent 2,512,775 is invalid and void.

5. That no subject matter disclosed in patent 2,444,748, patent 2,512,775 or reissue patent 23,261, or any related subject matter, was ever disclosed to either plaintiff in confidence or subject to an understanding, express or implied, that compensation would be paid to defendant therefor by either plaintiff.

6. That all flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, and radio receivers embodying or controlled by clocks, and all components thereof, manufactured and/or sold by each plaintiff were developed independently of any disclosure to either plaintiff by defendant.

7. That defendant has no rights in or based upon any subject matter disclosed in patent 2,444,748, patent

2,512,775 or reissue patent 23,261, or in or based upon any related subject matter, whether those rights be said to arise under the patent laws, from a contract or understanding, express or implied in fact or in law, confidential disclosure, or otherwise, which have been violated by either plaintiff by the manufacture, use or sale of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, radio receivers embodying or controlled by clocks, or any component of any of them, or otherwise.

8. That defendant's first and second counterclaims are hereby dismissed.

9. That defendant, his agents, servants, employees, attorneys and assigns, be and they hereby are enjoined from bringing any suit against either plaintiff, or any licensee of either plaintiff, or any purchaser or user of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, or radio receivers embodying or controlled by clocks, or any components of any of them, manufactured or sold by either plaintiff, or by any licensee of either plaintiff, (1) charging infringement of claims 7, 11, 16, 19 or 20 of patent 2,444,748, claims 7, 11, 16, 19-27 of reissue patent 23,261, or claim 10 or 11 of patent 2,512,775, or (2) charging that any other right of defendant in or based upon any subject matter disclosed in any of these patents, or in or based upon any related subject matter, has been violated by either plaintiff, or by any licensee of either plaintiff, in any way, or by such purchaser or user by its possession, use or sale of any such clock, radio clock combination, or any component of

10. That plaintiffs recover from defendant their costs in this action, to be taxed by the Clerk of this Court and made part of this judgment.

JAMES T. FOLEY
United States District Judge

Albany, New York
April 21, 1954

To: ANDROS & SMITH, ESQS.,
Attorneys for Defendant

SIRS:

TAKE NOTICE, that in the within entitled action, a Judgment, whereof the within is a copy, herewith served upon you has been this day duly entered in the office of the Clerk of the United States District Court for the Northern District of New York at Utica, New York.

Dated: April 22, 1954.

Yours, &c.,

WHALEN, MCNAMEE, CREBLE & NICHOLS,
Attorneys for the Plaintiffs,
Office & Post Office Address,
75 State Street,
Albany, New York

UNITED STATES DISTRICT COURT

Northern District of New York

Civil Action No. 3831

Telechron, Inc. and
General Electric Company,
Plaintiffs,

—against—

Anthony J. Parissi,
Defendant.

JUDGMENT

Whalen, McNamee, Creble &
Nichols
Attorneys for Plaintiffs,
Office and Post-Office Address
75 State Street
Albany, N. Y.

Orig. filed

April 22, 1954

G. A. Porter
Clerk

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

BERTHA ULMA, being duly sworn, deposes and says that she is over twenty-one years of age, and that on the 23rd day of April, 1954, at the Post Office in the City of Albany, New York, deponent deposited a copy of a Judgment, whereof the foregoing is a copy, properly enclosed in a post-paid wrapper, directed to Andros & Smith, Esqs., 90 State Street, Albany, New York, that being the address designated by them as attorneys for the defendant herein, for such purposes.

BERTHA ULMA

Subscribed and sworn to before me
this 23rd day of April, 1954.

E. MAE KINGSTON

E. MAE KINGSTON
Notary Public, State of New York
Residing in Albany county
Albany County Clerk's No. 482
My commission expires March 30, 1955